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Barbizon of Utah, Inc. v. General Oil Company, et al. : Supplemental Brief of Appellant

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BARBIZON OF UTAH, INC.,
Plaintiff and Appellant,

vs.

GENERAL OIL COMPANY, et al.,
Defendants and Respondents

Case No. 11364

SUPPLEMENTAL BRIEF OF APPELLANT

Appealed from the District Court of Utah County
State of Utah
THE HONORABLE JOSEPH E. NELSON, Judge

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STATEMENT OF THE CASE AND DISPOSITION IN LOWER COURT

This supplemental brief is filed on behalf of the plaintiff and appellant pursuant to an order of this court dated the 17th day of April, 1969.

The original brief of plaintiff and appellant fully sets forth the nature of the proceedings below, the decision of the trial court and the relief prayed for. In addition to the statement of facts contained in the original appellant's brief plaintiff now wishes to refer to certain other facts in the record, for purposes of emphasis and clarity, which may not be fully or clearly stated in the original brief.

STATEMENT OF FACTS

On page 6 of plaintiff's original brief it is pointed out that there are conveyances of record to the plaintiff and

its immediate predecessor in title which tie to the southeast corner of Section 36 and to a point in reference to the east right-of-way line of the Denver & Rio Grande Railroad Company (Plaintiff's Exhibit 1, pp. 105-106; Defendant's Exhibit 12). It should also be pointed out, however, that after plaintiff received title from Sowards, its immediate grantor, in 1946 (Plaintiff's Exhibit 1, p. 106), plaintiff secured from Sowards' grantors, to-wit Leithey and Cox, quit-claim deeds which tie to the *center* of Section 36, Township 6 South, Range 2 East, Salt Lake Meridian, and which deeds refer to the same beginning point that was used in the description from the patentee, James Smith, etux. to James A. Bean. (Plaintiff's Exhibit 1, p. 21) Thus, it should be emphasized that these quit-claim deeds from Leithey and Cox complete the unbroken basic chain of title from Smith, the patentee, down to the plaintiff. (Plaintiff's Exhibit 1, pp. 112 and 113) The record stands uncontroverted on this important point.

It should be further observed that in the deeds to plaintiff and to its immediate predecessor (Plaintiff's Exhibit 1, pp. 105 and 106) the description makes specific reference in its first course to a definite monument, to-wit, a fence and the west side of a lane. (Tr. 12, 13, 35, 36; Plaintiff's Exhibit 6) Moreover, the conflict between the descriptions of the plaintiff's and the defendant's properties only arises if the location of this lane as a monument is ignored. (Plaintiff's Exhibits 7 and 8; Tr. 16, 17, 37) In other words, these descriptions overlap each other if the metes and bounds descriptions of the two properties are strictly followed. (Tr. 16)

It is also pointed out in plaintiff's original brief that

the original descriptions of these properties coincided perfectly, inasmuch as both of them were tied to the center of Section 36. (Plaintiff's Exhibit 2, page 2; plaintiff's Exhibit 1, page 21; Tr. 56, 57, 60, 61 and 66) Moreover, the description in defendant's deed, under which it must claim title, contains references to definite and fixed monuments, namely, the west line of the property of Central Utah Vocational School and the west line of the property owned by Barbizon of Utah, Inc. (Exhibit 2, pages 14 and 15) Only by ignoring these monuments does any conflict exist between the property of plaintiff and defendant. (Tr. 36-39)

There is much evidence in the record of old fence lines. This is true with respect to the line between plaintiff's and defendant's property. Indications of these fence lines were observed as early as 1947. (Tr. 45, 46, 51, 54)

Additionally, it is established without dispute in the record that plaintiff is the successor in title to the land conveyed by the patentee, Smith, to James A. Bean. (Tr. 63) Furthermore, there is no deed out of the patentee, Smith, which enlarges the George Baum description through which defendant derives its title or which gives the defendant title to the land in dispute. (Exhibit 2, page 2; Tr. 64, 66)

The conflict in the descriptions of the properties of the plaintiff and defendant was created when the beginning point of the descriptions, apparently following a private survey, was changed from the center of Section 36 to the southeast corner of the section. (Tr. 67) The description in the defendant's deed exceeds the basic title of the defendant by 66 feet. (Tr. 69)

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS, CONCLUSIONS AND JUDGMENT OF THE COURT THAT DEFENDANT, GENERAL OIL COMPANY, IS THE OWNER OF AND ENTITLED TO POSSESSION OF THE REAL PROPERTY IN DISPUTE AND DECREED IT BY THE COURT.

POINT III.

THE COURT ERRED IN BASING ITS DECISION UPON CIVIL NO. 19838, DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, BARBIZON OF UTAH, INC. VS. STANFORD PATTON, ET AL.

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ARGUMENT

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS, CONCLUSIONS AND JUDGMENT OF THE COURT THAT DEFENDANT, GENERAL OIL COMPANY, IS THE OWNER OF AND ENTITLED TO

POSSESSION OF THE REAL PROPERTY IN DISPUTE AND DECREED IT BY THE COURT.

In plaintiff's original brief reference is made on page 9 to two important rules of conveyancing which must be kept in mind in the determination of the issues of this case. These are, first, that in the descriptions in deeds where only courses and distances, sometimes called metes and bounds, are used in describing the land being conveyed, the courses and distances or metes and bounds control.

Edwards v. Lee, (Ky.) 61 S.W.(2d) 1049;
Kentucky Union Co. v. Beatty, (Ky.) 61 S.W.2d 45;
Frost Lumber Industries v. Brantley, (Tex.) 109 S.W.2d 999.

These and many other decisions which could be cited hold that where courses and distances are used in a description and no monuments are called for, courses and distances prevail and are to be given great weight. Second, where deeds do not contain any ambiguity regarding the intention of the parties, no evidence is admissible outside the deed itself as to such intention.

Finlayson v. Denver & Rio Grande Western Railroad Co., 110 Ut. 319, 172 P.2d 142;
12 Am. Jur.2d, p. 548, Sec. 2;
23 Am. Jur.2d, p. 287, Sec. 250.

In addition to the case of *Appeal of Moore,* cited on page 11 of the plaintiff's original brief, see also

Wagner v. Thompson, 163 Kan. 662, 186 P.2d 278, and
Beans v. Worth, 201 Kan. 173, 438 P.2d 957.

Beans cites with approval *Moore's* holding that "an official survey merely establishes corners and boundary lines. It does not determine title to property in dispute."

In *Velasquez v. Cox*, 50 N. Mex. 338, 176 P.2d 909, plaintiff sought to claim title to a piece of land by reason of an independent survey made many years after the original survey under which the defendant claimed title. That court held that independent surveys which do not conform to original surveys are not binding upon the owners of patented lands claiming under an original survey.

These cases support the plaintiff's position that a deed based upon a private survey such as the one relied upon by the defendant, which changed the beginning point in a description from one quarter section corner to another, could not under any circumstances enlarge the defendant's title so as to give it land which could not be claimed by its predecessor in title outside of and beyond the basic title upon which the defendant's title must rest. This is exactly the effect which the court's judgment accomplished in this case.

On page 12 of plaintiff's original brief reference is made to the deeds under which the defendant and its immediate predecessor held its title, a description which specifically refers to plaintiff's west property line as a boundary, and which limited defendant's title to the plaintiff's west property line. The fact that such deed by courses and distances, if strictly followed, might go beyond that boundary line called for by the defendant's deed is immaterial. Whenever there is a conflict between courses and distances and boundaries or monuments, the former must

yield to the latter. This is so well established in the decisions of this court as to be beyond dispute.

Thus, in *Johnson Real Estate Co. v. Nielson,* 10 Ut.2d 380, 353 P.2d 918, it was held:

> "* * * Where calls in a deed give an initial point and * * * thence to some other natural monument * * * or * * * any other fixed monument * * * the distance call yields to the monument call."

See, also,

> *Scott v. Hansen,* 18 Ut.2d 303, 422 P.2d 525;
> *Bullion Beck & Champion Mining Co. v. Eureka Hill Mining Co.,* 36 Ut. 429, 103 P. 881;
> *Giauque v. Salt Lake City,* 42 Ut. 89, 129 P. 429;
> *Finlayson v. Denver & Rio Grande Railroad Co.,* supra.

In *Finlayson* it was specifically held that an "artificial" monument would take precedence over a metes and bounds description in a conveyance if a conflict existed between the two.

As heretofore indicated, plaintiff's Exhibit 2, pages 14 and 15, shows on its face that defendant's title is limited to plaintiff's west property line (Tr. 43) This is true irrespective of where the calls for courses and distances might lead and further assuming that they, if strictly followed, would include the property in dispute in this case. The rule that monuments control over courses and distances prevails in most, if not all, jurisdictions.

> 11 C.J.S. 2d, p. 614, Sec. 51.

In *American Law of Property*, Vol. 3, Sec. 12.117, p. 444, the author says:

> "* * * Generally, from the cases cited, when a description is by courses and distances, with designation of natural or artificial monuments making points or lines in the boundaries described, the lines will run to or along those monuments as the case may be, even if departure must be made from the courses or distances, or both, in order to do so. * * *"

The foregoing authorities amply support the plaintiff's contention that the court's finding No. 3 (R. 46) is not supported by the evidence, for the obvious reason, that, although the plaintiff received a deed from Sowards, (Plaintiff's Exhibit 1, p. 106) which contains a description which may be found in no other place in plaintiff's chain of title, it is not true and, is in fact, contrary to the evidence, that this is the only description which could support plaintiff's position in any way. The Sowards deed is supplemented and supported by the deeds subsequently obtained from Sowards' grantors, namely, Leithey and Cox. (Plaintiff's Exhibit 1, pp. 112 and 113) Moreover, as already pointed out, this finding ignores the title line specifically referred to in defendant's own deed which limits the boundary of defendant's property to plaintiff's west boundary line. (Exhibit 2, p. 114) This line was already established and in existence prior to the deed to defendant or its predecessor.

It is reversible error for a trial court to make findings which are not supported by the evidence in the record or which are contrary to the evidence.

In *Parker v. Weber County Irrigation Dist.*, 68 Ut. 472,

251 P. 11, this court reversed the judgment of a trial court which was based upon findings contrary to uncontradicted evidence in the record.

In addition see also

Green v. Palfreyman, 109 Ut. 291, 166 P.2d 215;
Jewell v. Hoiner, 12 Ut.2d 328, 366 P.2d 594;
Stringfellow v. Botterill Auto, 63 Ut. 56, 221 P. 861;
In Re Tarrant's Estate, 38 Cal.2d 42, 237 P. 505; and
Richens v. Struhs, 17 Ut.2d 356, 412 P.2d 314.

POINT III.

THE COURT ERRED IN BASING ITS DECISION UPON CIVIL NO. 19838, DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, BARBIZON OF UTAH, INC. VS. STANFORD PATTON, ET AL.

On page 15 of plaintiff's original brief in this case reference is made to the fact that the lower court, in deciding this case, purported to rely upon a decision rendered in an earlier case involving the question of which of two grantees would prevail when they claimed under a common grantor and the properties described in those deeds were in conflict with each other. From the testimony of the witness, Garrett, it is conclusively established that case No. 19838 was between Patton and the plaintiff, and that the decision in that case was that the grantee who claimed under a deed prior in date and recording should prevail. (Tr. 73) No claim is made by plaintiff that the decision in case No. 19838 was incorrect. The correctness of that

decision is supported by elementary principles of property law.

Thompson on Real Property, 1963 Rev., Sec. 4421, states the general rule applicable to such a state of facts:

> "* * * where a vendor makes two conveyances of the same land to innocent purchasers, neither having notice of the other's claim * * * the one who secures priority in recording has the valid title."

See, also, *Elsey v. Shaw*, (Okla.) 198 P.2d 439.

This rule is part of the statutory law of the State of Utah—Sec. 57-3-3 U.C.A. 1953.

Conceding the correctness of the ruling in case No. 19838, the fact remains that the issues in that case and in the one here under consideration were not the same, and consequently the applicable legal principles are different.

The trial court's finding No. 2 specifically states that the court considered the evidence and exhibits in case No. 19838. The evidence and the exhibits in that case were never offered in evidence by the defendant. For this reason it is impossible to determine from the record before this court what the evidence and exhibits were which the court considered in case No. 19838 which compelled a judgment in defendant's favor in this case. There was no attempt made to show that the issues in case No. 19838 were the same as those involved in this case. Moreover, the only evidence before the court as to the issues involved in case No. 19838 is affirmatively to the effect that those issues were not the same as the issues involved in this case. (Tr. 73)

It has been held in many cases that testimony or evidence given in another proceeding is not admissible where the issues involved in the other proceeding were substantially different from the issues before the court in the subsequent proceeding.

Stockgrowers State Bank v. Schultz (Wyo.) 276 P. 532;
Kuck v. Raftery, (Cal.) 4 P.2d 552.

In *Stockgrowers,* supra, the court affirmed the refusal of the trial court to admit testimony given in another proceeding by stating:

> "In our judgment this ruling was correct, as that action was between parties other than those in the present litigation, and *the issues were totally dissimilar.*" (Emphasis added)

By its finding No. 2 the trial court further found that defendant is the owner and in possession of the property described in the answer and the complaint of the defendant in case No. 29707. These statements are mere conclusions and do not constitute the finding of any fact upon which a legal conclusion could be based.

In *Giauque v. Salt Lake City,* supra, it was held that a trial court is bound to make findings which conform to the issues in the case before it and that a failure to make findings on all the issues is error. This court said:

> "* * * It is the duty of the trial court, and they should see to it, that in the preparation of findings, they respond to the issues, and that upon all material questions, either affirmative or, in case there is no evidence, negative findings be made."

It is submitted that there is no evidence in the record in this case to support the court's finding No. 2. Nowhere does it appear that the defendant was in possession of the property called for by plaintiff's deeds and record title, nor when that ownership or possession began. On the other hand, the evidence is undisputed that defendant has never been in physical possession of the property in dispute. (Tr. 40, 43, 46) The court's finding No. 2 stating that defendant is the owner and in possession of the property in dispute ignores the monuments referred to in defendant's own deed which limit the metes and bounds description to the boundary of the Vocational School property and the west property line of Barbizon of Utah. (Exhibit 2, page 14; Tr. 38 and 39) As has heretofore been stated, the Barbizon deed was prior in time and recording to the deed by which the defendant acquired its title. Plaintiff's deed from Sowards was dated October 28, 1946, and was recorded the same day. (Exhibit 1, p. 106) Defendant's deed, on the other hand, was dated about March 24, 1959, which is its date of acknowledgment, and was recorded March 26, 1959. (Exhibit 2, p. 14) Moreover, the evidence is undisputed that plaintiff's Exhibit 1 shows that plaintiff is the successor in interest to the property described in the deed to James A. Bean. (Plaintiff's Exhibit 1, p. 21) Furthermore, it is undisputed that neither defendant nor any of its predecessors obtained a deed or conveyance including any part of the property covered by the James A. Bean deed. (Tr. 64, 65, 66)

In view of the foregoing, a finding is compelled that the court's finding of fact No. 2 is not supported by the evidence.

POINT IV.

THE FINDINGS OF FACT ARE INSUFFICIENT TO SUPPORT THE CONCLUSIONS OF LAW AND JUDGMENT.

It is the duty of the trial court to make findings on all material issues, either affirmative or negative.

Giauque v. Salt Lake City, supra;
Baker v. Hatch, 70 Ut. 1, 257 P. 673;
Baird v. Upper Canal Irrigation Co.,
70 Ut. 57, 257 P. 1060;
LeGrand Johnson Corporation v. Peterson,
18 Ut. 2d 260, 420 P.2d 615.

Furthermore, the court's findings must be supported by the evidence.

Thomas v. Clayton Piano Co., 47 Ut. 91,
151 P. 543;
Jankele v. Texas Company, 88 Ut. 325, 54 P.2d 425.

Furthermore, failure to find on an issue is reversible error.

Mendelson v. Roland, 66 Ut. 487, 243 P. 798;
Piper v. Eakle, 78 Ut. 342, 344 P.2d 909.

Measured by these principles, an examination of the court's findings discloses them to be insufficient to support the court's conclusions and judgment as a matter of law.

These findings merely recite that plaintiff and defendant each had a survey made, which surveys cannot be reconciled; that previous decisions based upon surveys which tie to the railroad right of way are accurate and that defendant's survey which ties to the railroad right

of way as made by defendant's surveyor is more reliable. There is no finding of any fact which shows that defendant's title is superior to plaintiff's. The finding made by the court ignores completely that plaintiff claimed under a deed which is also tied to the railroad right of way; (Exhibit 1, p. 106) that plaintiff claims under an unbroken chain of title from the patentee (Tr. 63; Plaintiff's Exhibit 1); and that defendant's deed (Exhibit 2, pages 14 and 15) specifically limits the defendant's east boundary to the west line of plaintiff's property.

This finding, furthermore, fails to identify the decisions upon which the court found as a fact that surveys which tie to the railroad right of way are more accurate and more substantial than surveys which do not so tie.

The findings also ignore the survey which was made by Carr F. Greer, wherein he located the physical features on the ground, and particularly the west line of a certain lane, fences, the railroad track and the mill race (Tr. 14) and made plats which show the deed lines of the property claimed by plaintiff and defendant (Tr. 30-39).

The finding further ignores the undisputed evidence that defendant's chain of title contains no deed which in any way enlarges the property described in Exhibit 2, page 2, which is the only deed upon which defendant can base its claim to the property in dispute, and that defendant has no basic title to the property in dispute. (Tr. 64-69)

There is no finding that, lacking a basic title to the property in dispute, there is any other evidence which would support the defendant's claim of title. The findings of the

court further completely ignore the evidence that the monuments called for in defendant's deed limit defendant's property to plaintiff's west property line. Only by going beyond those monuments do the courses and distances called for in defendant's deed support its contention that the property in dispute belongs to the defendant. (Tr. 66)

The findings also ignore the evidence that if the original beginning point in the descriptions from the patentee, Smith, to Baum and Bean are used, both of which began at the center of Section 36, that there is no conflict between the property of the plaintiff and defendant and that only when the beginning point was changed by later surveys from the center of Section 36 to the southeast corner of said section does any conflict between the property of plaintiff and defendant arise. (Tr. 66-67) If the center of Section 36 is used as a beginning point, which plaintiff asserts must be done, then the property in dispute belongs to the plaintiff and not the defendant.

Finding No. 2 by also stating as a fact that defendant is in possession of the property described in its answer and in its complaint in case No. 29707, ignores the undisputed evidence that the defendant had no access to the property in dispute and, consequently, there is no basis for any finding of defendant's possession. (Tr. 40)

What the court should have found was that the plaintiff was in possession of the land called for by its deed; that the taxes on the property were assessed to the plaintiff and were paid by the plaintiff. (Exhibits 14 and 15)

In addition to the foregoing, the record shows, as

heretofore pointed out, that the deed under which plaintiff claims is prior in time and recording to the deed under which the defendant claims. (Exhibit 1, p. 106; Exhibit 2, pp. 14 and 15) There is a well established rule that there is a presumption that one claiming property covered by a deed is presumed to be in possession of the property described in the deed. This principle is recognized in the laws of the State of Utah in Sec. 78-12-7 U.C.A. 1953, which states:

> "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action."

The decisions of many states recognize this rule and hold that if one is in possession of any part of the land described in his deed it is presumed that he is in possession of all of the property described therein.

In *St. Mary Parish Land Company v. State Mineral Board* (La.) 167 So.2d 509, the court said:

> "Plaintiff alleged that it has a recorded deed to the property in question and that it is possessing it under the deed. We have a well recognized principle in this state that one who possesses any part of property acquired in a recorded deed, is presumed to possess the whole of the property described therein. It naturally follows, according to this principle, that the

> plaintiff is presumed to be in possession of all of the property described in its deed, including water bottoms, if any. It is therefore entitled to seek to be quieted in its possession thereof."

To the same effect see *Goen v. Sansbury*, 219 Md. 289, 149 A.2d 17, wherein that court said in a case involving a claim of adverse possession:

> "This court has decided that the possession of part of a tract of land by the rightful owner is constructive possession of the whole as against one claiming the whole under color of title, except as to the part actually occupied by the claimant."

In *Houghton County v. Massie*, 215 Mich. 654, 184 N.W. 446, defendant was claiming title by adverse possession against the record owner of the land. The court held that the record owner was deemed to be in possession and stated:

> "The plaintiff, having title of record to the land, is deemed in law to be in seizin and possession thereof. Such seizin is coextensive with the right and continues until the owner is ousted by adverse possession of another."

There is no claim in this case that defendant is asserting any claim to the disputed property by adverse possession. Consequently, defendant must fail upon the principle that plaintiff is presumed to be in possession of all of the land called for by its prior deed.

The whole of defendant's claim to the property in dispute is based solely upon the assertion that the defendant could by an arbitrary, private survey, change the descrip-

tion called for by the deeds of its predecessors and thereby enlarge its title to include land to which it has no basic title.

POINT V.

PLAINTIFF'S MOTION TO AMEND AND SUPPLEMENT THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AND DECREE OR, IN THE ALTERNATIVE, TO GRANT A NEW TRIAL SHOULD HAVE BEEN GRANTED.

After the trial court made its findings, conclusions and judgment (R. 35-37) plaintiff filed its motion requesting the trial court to amend and supplement its findings of fact and conclusions of law. (R. 42-44) This motion was denied. (R. 18) The authorities cited under Point IV of this supplemental brief fully support the contentions of the plaintiff that it was entitled to the additional and supplemental findings requested, even though this would have resulted in a judgment for the plaintiff and against the defendant.

The case of *Thomas v. Clayton Piano Company,* supra specifically holds that in a case tried to the court without a jury the court should find the facts on every issue, either affirmatively or negatively, as the evidence may be, and thus give the defeated party an opportunity to appeal the finding as not being supported by the evidence. This the trial court in this case has refused to do.

It has been pointed out herein and in the plaintiff's original brief that each of the requested amendments and supplemental findings are in fact supported by evidence which is uncontradicted.

CONCLUSION

The judgment of the court below is not supported by the evidence in the record. And, on the other hand, said record and evidence shows as a matter of law that said judgment should be reversed and a decree entered quieting the title of the plaintiff to the property in dispute against all the claims, demands and pretensions of the defendant.

Respectfully submitted,

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